

Underinvestment in Women Directors and Entrepreneurs

ROSE MCKINLEY*

"In the absence of water, people drink sand. And that is sad. There's such an interest in things being equal and such a weary acceptance that it's not."

- Shonda Rhimes, October 2015¹

INTRODUCTION

California is the American mecca for creativity and invention. As the home of Jackie Robinson,² Chief Justice Earl Warren,³ and the Free Speech Movement,⁴ the Golden State has been a driving force for progressive thought in American culture.⁵ Its politics are decidedly leftist: Both of the state's U.S. senators and 64% of congressional representatives are Democrats, and Democrats have strong majorities in both state legislative houses and hold all eight elected statewide offices.⁶ President Obama won 61% of the statewide vote in 2008,⁷ and won California again in 2012.⁸ In part because of its leftist politics, California has aggressive anti-discrimination statutes⁹ and broad reproductive choice laws aimed

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* Rose McKinley is a third year law student at Duke University, School of Law where she serves as the Bar Association President. After graduation she plans to head to Palo Alto, California to work on corporate transactions for technology and entrepreneurial clients for a large law firm.

1. Maureen Dowd, *The Women of Hollywood Speak Out*, N.Y. TIMES MAG., Nov. 22, 2015, at MM40.
2. *Jackie Robinson Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/jackie-robinson-9460813> (last visited Sept. 29, 2016).
3. *Biography of Earl Warren*, EARL WARREN C., <https://warren.ucsd.edu/about/biography.html> (last visited Sept. 29, 2016).
4. *The Free Speech Movement*, U. of CAL., <https://calisphere.org/exhibitions/43/the-free-speech-movement/> (last visited Sept. 29, 2016).
5. Peter Schrag, *Progressive California: The Long Road Back*, AM. PROSPECT, Winter 2016, at 11.
6. Dan Walters, *2012 Could Wind Up Being a Big Year in California Politics*, SACRAMENTO BEE, Jan. 2, 2012, at A3.
7. *Supplement to the Statement of Vote*, CALIFORNIA SECRETARY OF STATE (Oct. 25, 2016, 11:58 AM), <http://elections.cdn.sos.ca.gov/sov/2008-general/ssov/4-pres-statewide-summary-by-county.pdf>.
8. *Presidential Election Results*, NBC NEWS (Oct. 25, 2016, 11:59 AM), <http://elections.nbcnews.com/ns/politics/2012/all/president/#.WB1jxYXZr3k>.
9. See Fair Employment and Housing Act (FEHA), Cal. Gov't Code §§ 12900–12996. (Cal. 1959).

at promoting, among other things, women's full participation in the state's economy.¹⁰ Even the official state slogan demands that visitors "Dream Big."¹¹

Nowhere better represents this uniquely Californian attitude of creative invention than Hollywood and Silicon Valley. The world leaders in both entertainment and entrepreneurship—Los Angeles¹² and the Bay Area¹³—bookend the state. Beyond the geographical coincidence of sharing California, both Hollywood and Silicon Valley rely on talent, fierce competition, and reputational capital, a point highlighted by the fact that many powerful players in the entertainment industry have recently migrated into the entrepreneurship space.¹⁴ More specifically, both the entertainment industry and entrepreneurial space require that a lot of money changes hands before a successful product is made. Just as an entrepreneur cannot effectively grow an emerging company towards viability without successfully raising capital from Venture Capitalists (VC),¹⁵ financial support from studios or producers is key to creating a successful film.¹⁶

The entertainment industry and entrepreneurial space also share a more problematic characteristic: Both are disproportionately dominated by men. In California's two most famous regions, California's promise of self-advancement and equal opportunity seems to be more difficult for women to achieve.

This note looks to examine why women are less likely to have their films or companies funded and correspondingly, how the law might address that gender disparity. For the purposes of this note, Hollywood represents the entertainment industry and specifically, the film industry. Similarly, Silicon Valley refers to the entrepreneurial hotbed of the Bay Area.

Part I of this note describes the lack of women in positions of power in both Hollywood and Silicon Valley. Part II examines the structural similarities between Hollywood and Silicon Valley, and how those structural characteristics contribute to the gender disparity in both areas. In particular, this note looks at those

10. Tim Hrenchir, *California Abortion Laws and How They Compare Nationally*, NEWSMAX (Oct. 5, 2015, 9:29 AM), <http://www.newsmax.com/FastFeatures/California-abortion-laws/2015/10/05/id/694710/>.

11. VISIT CALIFORNIA, <http://visitcalifornia.com> (last visited Sept. 29, 2016).

12. *California Legends: Hollywood - Home of the Stars*, LEGENDS OF AM. (Aug. 2015), <http://www.legendsofamerica.com/ca-hollywood.html>.

13. See Nathan Heller, *Bay Watched: How San Francisco's New Entrepreneurial Culture is Changing the Country*, NEW YORKER, Oct. 14, 2013, at 71 (explaining that San Francisco has become a center for the technology industry).

14. Josh Dickey, *The Great Migration: Top Talent Streams to Silicon to Tech*, MASHABLE ENT. NEWS (June 4, 2014), <http://mashable.com/2014/06/04/hollywood-silicon-beach-tech-talent>; Laura Sydel, *California Civil War Over Internet Piracy*, NAT'L PUB. RADIO (Feb. 23, 2012, 4:38 PM), <http://www.npr.org/2012/02/23/147294229/california-industries-spar-over-internet-piracy> (explaining that Google's YouTube commissioned professionals in Hollywood and New York to create channels on the site because Google didn't have the talent or expertise).

15. Alex Iskold, *8 Things You Need to Know About Raising Venture Capital*, ENTREPRENEUR (July 15, 2015), <https://www.entrepreneur.com/article/248377>.

16. See generally *Financing*, FILMMAKING STUFF, <http://www.filmmakingstuff.com/film-finance/> (last visited Oct. 1, 2016) (providing various tips for independent filmmakers to overcome financing obstacles).

structural similarities as they impact women directors and women entrepreneurs, and in turn shape the movies that get produced and companies that succeed.

Part III discusses the ongoing Equal Employment Opportunity Commission (EEOC) investigation into Hollywood, outlines a potential EEOC suit against Hollywood studios, and predicts how that investigation might shape Hollywood's hiring practices to ultimately increase gender equality in the film industry. Finally, this note proposes how the same legal arguments that address the gender disparity in Hollywood might be applied to address Silicon Valley's gender disparity.

PART I: GENDER DISPARITY IN HOLLYWOOD AND SILICON VALLEY

A. Hollywood's Representational Ghetto for Women

"Their refusal to hire more female directors is immoral, maybe illegal, and has helped create and sustain a representational ghetto for women."

- Mahola Dargis, Film Critic at *The New York Times*¹⁷

In Hollywood, for every woman working in film there are five men.¹⁸ Women comprised just 19% of all directors, writers, executive producers, producers, editors, and cinematographers working on the top 250 domestic grossing films of 2015.¹⁹ Although this was a 2% increase from 2014, women's percentage of the top positions in the highest grossing films has been nearly stagnant since 2001.²⁰ Women made up just 9% of directors in 2015, which was a slight increase above 2014's numbers, but the same percentage as 1998.²¹ In short, although there have been slight oscillations between years, the position of women in the film industry has remained relatively stagnant over the last two decades.

Whether or not the director is a woman impacts the roles other women get in the film. Films with at least one woman director also employ greater percentages of women in other roles. For example, in films with at least one female director, women comprised 53% of writers.²² Conversely, in films with male directors, women comprised just 10% of writers.²³ Women directors also tend to more directly tell stories about women: Films with female directors and writers have higher percentages of female characters, and especially female protagonists.

Increasing the number of women directors therefore has the potential to create a trickle-down effect that eventually leads to an increase in the number of women characters portrayed on screen. And there's certainly room for the number of female characters to increase. In 2015, women comprised only 22% of

17. Manohla Dargis, *Lights, Camera, Taking Action*, N.Y. TIMES, Jan. 25, 2015, at AR1.

18. Sarah Mirk, *For Every Woman Working in the Film Industry, There are Five Men*, BITCH MEDIA (Nov. 27, 2013, 2:41 PM), <https://bitchmedia.org/post/for-every-woman-in-the-film-industry-there-are-five-men>.

19. Martha M. Lauzen, *The Celluloid Ceiling: Behind-the-Scenes Employment of Women on the Top 100, 250, and 500 Films of 2015*, SAN DIEGO ST. U.: CTR. FOR THE STUDY OF WOMEN IN TELEVISION AND FILM (2016).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

protagonists and 18% of antagonists.²⁴ Just 34% of major characters and 33% of all speaking characters in the top 100 domestic grossing films were women.²⁵ The picture is especially bleak for female characters of color, who were less likely than white females to be major characters. Of the 33% of all speaking characters portrayed by women, just 27% were Black, Latina, Asian, or another race/ethnicity.²⁶

The significance of increasing the number of women protagonists or speaking characters can be characterized as a moral issue. Movies play a critical role in American culture: they are the stories our country tells about itself. If a disproportionate amount of movies focus on and star men, then our culture disproportionately focuses on the experience of the American man, at the expense of telling the stories of the American woman. In the words of Manhola Dargis, *The New York Times*' film critic, the entertainment industry's "refusal to hire more female directors is immoral, maybe illegal, and has helped create and sustain a representational ghetto for women."²⁷

Of course, as some critics aptly point out,²⁸ the movie business is just that—a business.²⁹ And a big one at that. In 2012, even despite gender disparities, the U.S. entertainment industry made more than \$479.23 billion.³⁰ The U.S. film industry alone is expected to make over \$30 billion this year. Regardless of its cultural significance, Hollywood exists primarily as an industry.

As women become increasingly powerful purchasers in the American economy,³¹ Hollywood's failure to cater more directly to them becomes an increasingly dangerous business risk. Imagine how much more money the industry could have generated had studios and producers invested more in women-directed films that focused more on women characters and storylines. Filmmaker Adam McKay makes the point more bluntly, "I don't think it's a moral issue . . . It's just a stupid artistic and business decision. If everyone's gonna pass on all the strong, ass-kicking lady directors and writers out there, we'll take them."³² Or, as *Orange is the New Black*'s creator Jenji Kohan stated simply, "Talent with all sorts of genitalia can make money."³³

24. Martha M. Lauzen, *It's a Man's (Celluloid) World: Portrayals of Female Characters in the Top 100 Films of 2015*, SAN DIEGO ST. U.: CTR. FOR THE STUDY OF WOMEN IN TELEVISION AND FILM (2016).

25. *Id.*

26. *Id.*

27. Dargis, *supra* note 17.

28. Stanley Fish, Opinion, *Are the Studios in the Morality Business?; No One is Paying Hollywood to Improve Society by Prioritizing Diversity*, L.A. TIMES, Feb. 28, 2016, at A22.

29. *Id.*

30. Paul Bond, *Study: Global Entertainment Industry Poised to Top \$2 Trillion in 2016*, BILLBOARD BIZ (June 5, 2013, 11:39 AM), <http://www.billboard.com/biz/articles/news/global/1565728/study-global-entertainment-industry-poised-to-top-2-trillion-in>.

31. *The Growing Power of Women*, TIME, <http://content.time.com/time/interactive/0,31813,2031700,00.html> (last visited Sept. 30, 2016).

32. Dowd, *supra* note 1.

33. *Id.*

At the same time as women and girls are experiencing increasing purchasing power,³⁴ teenage boys—once the paramount target group for the movie industry—are decreasingly interested in the movie going experience. Young men are increasingly fixated on gaming, rather than film, for their entertainment purchases. As Shonda Rhimes, arguably the entertainment industry's most powerful woman, explained, "There's a very hungry audience of young women dying to see some movies. They came out for *Titanic* and *Twilight*, 14-year-old girls going back to see those movies every day. I find it fascinating that this audience is not being respected. In the absence of water, people drink sand. And that is sad. There's such an interest in things being equal and such a weary acceptance that it's not."³⁵ Instead of paying for movies made by women that tell stories of women, women audiences are increasingly drinking sand.³⁶

Despite substantial numbers of women in the filmmaking pipeline,³⁷ the perception remains strong among industry executives and employers that there are "not enough" women directors and that women lack ambition or interest in directing. As one woman in the industry described, there is "some equality in the film school area, but once they get out of film school and finish their short films, that's when they're reaching some barriers."³⁸

The success of women at the Sundance Film Festival is one piece of evidence pointing to an overestimate on how dry the pipeline is for women directors. In 2015, women directors' films won 13 of the festival's 35 awards, and women directed about a third of the festival's documentary films.³⁹ Yet their success in these feeder sectors does not translate into studio opportunities the way it does for male directors; women directed less than 5% of box office hits from 2002 to 2014. The women who succeed at Sundance, and directors like Catherine Hardwicke whose movies are hits and yet are never selected again,⁴⁰ illustrate that movie studios and producers overstate the lack of women eligible to get work as directors.

34. *The Growing Power of Women*, *supra* note 31.

35. Dowd, *supra* note 1.

36. See HuffPost Entertainment, "Let Her Go": *The Movie Cliché Supercut*, YOUTUBE (Sept. 30, 2014), <https://www.youtube.com/watch?v=iR-s07VndGA> (compiling a particularly entertaining montage of the tired, "let her go" scene of a man saving a female character).

37. Shaunna Murphy, *Want to See More Women at the Oscars? It Starts at Sundance*, MTVNEWS (Jan. 24, 2015), <http://www.mtv.com/news/2058664/women-directors-oscars/>.

38. *Id.*

39. Ellen Freudenheim, *Women Movie Directors Make a Mark at Sundance Film Festival 2015*, HUFFINGTON POST (Feb. 02, 2016, 2:46 PM), http://www.huffingtonpost.com/ellen-freudenheim/a-dozen-women-directors-w_b_6589124.html.

40. Sarah Hansell, *'Twilight' Director Catherine Hardwicke Advocates for Women in Film*, STREET ROOT NEWS (Feb. 25, 2016), <http://news.streetroots.org/2016/02/25/twilight-director-catherine-hardwicke-advocates-women-film>.

B. Silicon Valley's Chummy Fraternity

"Women who try to start tech companies face exclusion by a venture capital network dominated by a chummy fraternity of men."

- Clair Cain Miller⁴¹

If the lack of gender diversity is bad in Hollywood, the problem is even more dire 400 miles north. A lack of gender diversity permeates almost every level of Silicon Valley's tech and entrepreneurial space.⁴² Venture Capital (VC) firms sit at the top of Silicon Valley's famously competitive food chain. In bestowing emerging companies with their capital, VC firms largely dictate which entrepreneurs succeed and thereby shape which technologies and products ultimately end up in front of consumers. In these incredibly important partnerships, women are almost entirely absent; just 6% of partners at VC firms are women.⁴³ The problem is even worse among the top VC firms. Of the 92 firms that have raised funds over \$200 million since 2009, there were 542 partner-level venture capitalists. Just 23, or 4.2%, were women.⁴⁴ Nearly 80% of VC firms have never had a woman represent them on the board of one of their portfolio companies.⁴⁵

The male dominance of VC firms might explain the bias towards men seeking investment. Women are a noticeable force in the U.S. economy. And yet, they make up just 2.7% of CEOs of companies receiving VC funding. At least one study suggests that having something inherently in common with the funder, decision maker or investor makes a difference in securing funding.⁴⁶ And entrepreneurs demonstrate a strong predisposition to seek funding from members of the same sex.⁴⁷ Women investors are far more likely to directly connect and to be able to attract female-led ventures to their firms.⁴⁸

As a result of the dearth of women in VC firms, men are more likely to be successful when pitching an idea. In pitching ideas, men were more likely to succeed in securing investment than women—even when the pitches were identical.⁴⁹ Pitches narrated by men were selected 68% of the time, versus 32% for

41. Claire Cain Miller, *Google Releases Employee Data, Illustrating Tech's Diversity Challenge*, N.Y. TIMES, June 2, 2014, at B7.

42. Gail Sullivan, *Google Statistics Show Silicon Valley has a Diversity Problem*, WASH. POST (May 29, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/05/29/most-google-employees-are-white-men-where-are-allthewomen/>.

43. Candida G. Brush, Patricia G. Greene, Lakshmi Balachandra & Amy E. Davis, *The Diana Report, Women Entrepreneurs 2014: Bridging the Gender Gap in Venture Capital Executive Summary*, BABSON C.: ARTHUR M. BLANK CTR. FOR ENTREPRENEURSHIP (Sept. 2014).

44. Dan Primack, *Venture Capital's Stunning Lack of Female Decision-Makers*, FORTUNE (Feb. 6, 2014, 6:30 PM), <http://fortune.com/2014/02/06/venture-capitals-stunning-lack-of-female-decision-makers/>.

45. Davey Alba, *The Gender Problem in Venture Capital is Really, Really Bad*, WIRED (Mar. 20, 2015, 2:39 PM), <https://www.wired.com/2015/03/gender-problem-venture-capital-really-really-bad/>.

46. Cindy Padnos, *High Performance Entrepreneurs: Women in High Tech*, ILLUMINATE VENTURES (Feb. 1, 2010).

47. *Id.*

48. *Id.*

49. Alicia M. Robb, *Narrowing the Gender Gap in the VC World*, FORBES (Nov. 12, 2014, 10:27 AM), <http://www.forbes.com/sites/kauffman/2014/11/12/narrowing-the-gender-gap-in-the-vc->

women.⁵⁰ The men's pitches were rated as more persuasive, logical and fact based.⁵¹ The bias was particularly true for women without a technical degree, who were perceived as having less leadership ability than their male counterparts and ended up getting less investment than men without technical degrees.⁵²

Conversely, VC firms that do have women partners are twice as likely to invest in companies with women in management roles and three times as likely to do so when the CEO is a woman.⁵³ And those companies that are venture capital-funded companies and have at least one woman on the executive team "perform better on multiple fronts."⁵⁴ So, in failing to invest more aggressively in women-led companies, VC firms without women partners are consistently failing to invest in otherwise viable companies.

As Sequoia partner and the "God of Silicon Valley"⁵⁵ Jim Goetz recalled, not having a woman partner has translated into missed opportunities for even one of the most powerful funds.⁵⁶ Goetz pointed to the lack of women in the room when Sequoia decided not to fund Pinterest, a now wildly successful startup that appeals more to women than men. Jennifer Reynolds, a Canadian entrepreneur, stated that because male venture capitalists often don't have female colleagues, they instead are left asking their wives about ideas to gauge women's interest in a potential investment. "That's fine, and their wives might have a good perspective, but their wives are not venture capital investors. Clearly, they don't have the right talent around the table."⁵⁷

Certainly, there are many explanations for why women are so underrepresented in Silicon Valley. The disproportionate—though growing—number of women in computer science, engineering and other fields that lend

world/#44e1de8062c9.

50. Allison W. Brooks, Laura Huang, Sarah W. Kearney, Fiona E. Murray, *Investors Prefer Entrepreneurial Ventures Pitched by Attractive Men*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA (Oct. 27, 2016, 5:06 PM), <http://www.pnas.org/content/111/12/4427.full>.

51. *Id.*

52. *Id.*

53. Brush et al., *supra* note 43.

54. Broede Carmody, *How the Gender Gap in VC Funding Can be Tackled in 2015*, STARTUPSMART (Jan. 7, 2015), <http://www.startupsmart.com.au/advice/funding/how-the-gender-gap-in-venture-capital-funding-can-be-tackled-in-2015/>.

55. Alyson Shontell, *Jim Goetz is Silicon Valley's God*, BUS. INSIDER (Feb. 19, 2014, 6:09 PM), <http://www.businessinsider.com/jim-goetz-whatsapp-investor-2014-2>; see also Kelly McLaughlin & Regina F. Graham, *Wife of Famed Multimillionaire Tech Investor Caught Calling LeBron James a Crybaby During Game Against the Warrior*, DAILYMAIL.COM (Dec. 25, 2015, 10:05 PM), <http://www.dailymail.co.uk/news/article-3374396/LeBron-James-catches-Warriors-fan-sitting-courtside-act-calling-crybaby-Christmas-day-game.html> (highlighting a comical glimpse of Jim Goetz, as he was caught next to his wife while she made "crybaby motions" at LeBron James during an NBA game this season).

56. Lauren K. Ohnesorge, *Sequoia Capital's Jim Goetz Calls Tech Gender Gap 'Embarrassing' During CED Tech Venture*, TRIANGLE BUS. J. (Sept. 17, 2015, 8:57 AM), <http://www.bizjournals.com/triangle/blog/techflash/2015/09/the-lebron-behind-the-facebook-whatsapp-deal-finds.html>.

57. Jessica McDiarmid, *How to Fix Venture Capital's Gender Disparity Problem*, CANADIAN BUSINESS (May 5, 2015), <http://www.canadianbusiness.com/leadership/women-in-vc/>.

themselves to jobs in the tech industry is one.⁵⁸ But the lack of women VC partners cannot be ignored in attempting to solve the problem of underinvestment in women entrepreneurs.

Ultimately the lack of gender diversity in Silicon Valley impacts women consumers. As Kauffman Fellow Alicia Robb explained, "This lack of diversity on the funder's side is problematic, because investors are not funding things we [as women] want to see in the market."⁵⁹ Because the ideas put forth by men are more likely to gain VC support, those ideas are disproportionately likely to make it to market. Ideas put forth by women are more likely stifled, and the economy loses out on a vital source of growth and jobs.

PART II: STRUCTURAL SIMILARITIES BETWEEN HOLLYWOOD & SILICON VALLEY

The cultural difference between California's southern and northern ends is well documented.⁶⁰ That difference has become even more pronounced as the tech giants in Silicon Valley have shifted economic power north. Hopes that a balance would be struck between Hollywood as content creator and Silicon Valley as content distributor seem largely misplaced;⁶¹ the rise of content creation by Amazon, Netflix and other tech companies has Hollywood executives fearing that Silicon Valley might take over its southern neighbor.⁶²

Despite the tension between California's economic powerhouses, there remain some structural similarities between the two industries that lend themselves to allowing implicit biases against women to thrive. First, the people with talent or ideas—the raw materials of movies and of emerging companies—are not the same people with the capital to make those talents or ideas succeed. For women filmmakers and entrepreneurs, this means that women must convince men to trust them with their money.⁶³

The holders of that capital therefore serve as gatekeepers to success. In that function, both studios and VC firms dictate what sorts of movies or products make

58. See Chuck Leddy, *Closing the Gender Gap in Computer Science*, HARV. GAZETTE (Feb. 11, 2014), <http://news.harvard.edu/gazette/story/2014/02/closing-the-gender-gap-in-computer-science/> (detailing the existing disproportion of women in computer science and engineering fields and various efforts to decrease that disproportion).

59. Editorial Staff, *Kauffman Fellow Alicia Robb Ignites Efforts to Bridge Gender Gap in Venture Capital*, ENTREPRENEURS NOTEBOOK: ZELL LURIE INS., U. OF MICH. (Oct. 15, 2015), <https://zelllurie.wordpress.com/2015/10/15/kauffman-fellow-alicia-robb-ignites-efforts-to-bridge-the-gender-gap-in-venture-capital-entrepreneurial-business/>.

60. See Sharon Swart, *Silicon Valley vs. Hollywood: Clash of the Corporate Cultures*, HOLLYWOOD REP. (May 29, 2014), <http://www.hollywoodreporter.com/news/silicon-valley-hollywood-clash-corporate-707147> (showing the differences between Hollywood and Silicon Valley's corporate cultures).

61. Michael Malone, *Hollywood and Silicon Valley: ReKindling a Failed Romance?* FORBES (Nov. 18, 2015), <http://www.forbes.com/sites/mikemalone/2015/11/18/hollywood-and-silicon-valley-rekindling-a-failed-romance/#1300c2aa4b72>.

62. Nick Bilton, *Silicon Valley Stirs Up Hollywood*, N.Y. TIMES, Oct. 15, 2014, at E2.; Anita Balakrishnan, *Apple, Facebook, Other Giants Push Silicon Valley Toward Hollywood*, CNBC ENT. (Apr. 19, 2016), <http://www.cnbc.com/2016/04/19/apple-facebook-other-giants-push-silicon-valley-toward-hollywood.html>.

63. Nsenga Burton, *Black Women and the Hollywood Shuffle*, ROOT (Aug. 6, 2010), http://www.theroot.com/articles/culture/2010/08/black_women_filmmakers_struggle_in_hollywood/.

it to the marketplace. If studios in Hollywood and VC firms in Silicon Valley don't invest in certain kinds of directors or entrepreneurs, then those decisions ripple down the entire chain, ultimately depriving the market of movies and companies made by women.

Additionally, in both Hollywood and Silicon Valley, many more films and products fail than succeed. As one tech journalist explained, "[t]he forces that govern movies and start-ups are remarkably similar. They both follow what is known as a power-law distribution, meaning that the overwhelming majority of investments lose money, while a small fraction break even or become marginally profitable, and an even smaller fraction become wildly successful."⁶⁴ The high failure rate forces those making hiring and investment decisions to minimize risk. This risk aversion disincentivizes straying from the norm. Because hiring a male director or investing in a male CEO is standard practice, to hire or invest in a woman is to stray from the norm—an inherently risky move.

The risk-averse climate also drives decision makers in Hollywood and Silicon Valley to employ hiring and investment tactics that are designed to minimize risk. As a result, highly subjective hiring and evaluation practices and networking/relationship-based hiring and investment practices dominate both industries, with a particular emphasis on who-you-know or “word-of-mouth” recruiting and investing.

These tactics are not aimed at systemically discriminating against women. They are intended to limit risk. And they may well be effective forms of minimizing risk. Nonetheless, the intended goals or effectiveness of employment hiring practices are irrelevant for the purposes of determining whether they violate Title VII of the Civil Rights Act. Indeed, illegal disparate treatment can occur not only where an “employer consciously intended to base [its actions on an employee’s gender]” but also where the employer “simply did so because of unthinking stereotypes or bias.”⁶⁵

The risk of unconscious bias discrimination is particularly high where employers use the kinds of highly subjective practices prevalent in the entertainment industry.⁶⁶ For that reason, the EEOC has launched an investigation into movie studios after being urged to do so by the Los Angeles office of the American Civil Liberties Union.⁶⁷

PART III: WILL THE EEOC INVESTIGATION SHAPE HOLLYWOOD HIRING PRACTICES, & WILL THAT RIPPLE NORTH TO SILICON VALLEY?

The EEOC has authority to investigate industries with systemic bias in order to develop and initiate charges against employers who engage in a pattern or

64. Noam Scheiber, *Andreessen Horowitz, Deal Maker to the Stars of Silicon Valley*, N.Y. TIMES, May 1, 2015 at BU6; see also Cara Buckley, *A.C.L.U. Pushes for Inquiry Into Bias Against Female Directors*, N.Y. TIMES, May 13, 2015 at C1.

65. *Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 58 (1st Cir. 1999).

66. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988) (finding “subjective” hiring practices can be discriminatory because of “subconscious stereotypes and prejudices”).

67. David Robb, *Feds Officially Probing Hollywood’s Lack of Female Directors*, DEADLINE (Oct. 6, 2015), <http://deadline.com/2015/10/female-directors-hollywood-federal-investigation-eec-12015684-87/>.

practice of discrimination.⁶⁸ The Supreme Court emphasized the Commission's broad and flexible power to investigate and remedy systemic discrimination, noting that Congress believed that "broad-scale action against patterns or practices of discrimination was essential if the purposes of Title VII were to be achieved. The EEOC . . . [is] thought to be in the best position to determine where 'pattern or practice' litigation is warranted."⁶⁹

This is not the first time the EEOC has exerted its power against Hollywood. In the 1960s, the EEOC began an investigation of Hollywood about systemic discrimination against women and people of color.⁷⁰ The EEOC held hearings on equal opportunity for both women and people of color in film and television.⁷¹ Those hearings identified barriers facing women and people of color. Specifically the EEOC flagged the practice of excluding women and people of color from "rosters," or lists, of eligible employees.⁷² As a result, the EEOC determined that Department of Justice (DOJ) should begin litigation against the entertainment sector under Title VII. The DOJ investigated and agreed with the EEOC that a pattern of discrimination existed and that litigation was therefore appropriate.⁷³ Rather than go to trial, a number of unions in Hollywood and the Association of Motion Picture and Television Producers entered into settlement agreements.⁷⁴ However, because there were so few women in Hollywood's work force, they were left out of the agreements.⁷⁵ By 1976 the EEOC had stopped monitoring compliance with the settlements.⁷⁶

Separately, the Office of Federal Contract Compliance Programs (OFCCP) and General Services Administration (GSA) investigated the studios in the early 1970s.⁷⁷ They found that Universal under-utilized women and minorities in a number of job categories; as a result, Universal agreed to a system of monitoring and reporting.⁷⁸ Subsequently, the GSA reviewed other major studios including Warner Brothers, Columbia, MGM, Paramount, 20th Century Fox, and Disney but did not specifically address discrimination against women directors.⁷⁹ Ultimately, those efforts failed to create improvements in the industry's hiring practices. Legal action against Hollywood did have an effect in raising the number of women

68. Barry Hartstein, *Looking Backward and Forward: A Review of Key EEOC Developments, Successes and Failures in FY 2015 and What To Watch For in FY 2016*, LITTLER (Nov. 23, 2015), <https://www.littler.com/publication-press/publication/looking-backward-and-forward-review-key-eEOC-developments-successes>.

69. *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 69 (1984) (quotations omitted).

70. Kim Kirschenbaum, *EEOC Probes Hollywood Hiring Practices*, REG BLOG (Nov. 9, 2015), <http://www.regblog.org/2015/11/09/kirschenbaum-eeoc-hollywood-hiring/>.

71. *Id.*

72. CAL. ADVISORY COMM. TO THE U.S. COMM'N ON CIV. RTS., *BEHIND THE SCENES: EQUAL EMPLOYMENT OPPORTUNITY IN THE MOTION PICTURE INDUSTRY 11-14* (1978) (summarizing early history of efforts by anti-discrimination agencies to enforce civil rights mandates in Hollywood).

73. *Id.* at 13.

74. *Id.*

75. *Id.* at 13-14.

76. *Id.* at 37.

77. CAL. ADVISORY COMM., *supra* note 72, at 38-39.

78. *Id.* at 39.

79. *Id.*

directors, but only briefly.⁸⁰ “The Original Six,” who started the Directors Guild of America’s (DGA) Women’s Steering Committee in 1979 encouraged the DGA to launch a class action lawsuit in 1983 against the studios.⁸¹ That suit contributed to moving the number of women directors from .05% to 16% in 10 years.⁸²

Industry self-regulation of the lack of women directors has also largely failed. Arguably, it has made the disparity even worse. The DGA has implemented programs aimed at increasing the number of women directors. Specifically, it created a shadowing program where women directors could shadow a male director.⁸³ However, it has become just additional hoop that women directors must jump through and has not actually produced jobs at the end of the program.⁸⁴ According to the ACLU investigation, many women directors perceive the program as creating a double-standard.⁸⁵ Although the DGA describes the programs as providing women with opportunities to shadow experienced directors on set, with networking and mentoring opportunities and training, at least 10 women in the ACLU investigation reported that the programs were too small, too hard to get into, and, most importantly, did not lead to employment opportunities for most women.⁸⁶ Worse, one woman described the shadow programs as “window-dressing.”⁸⁷ Not only are the programs unpaid, they do not guarantee a job, even for those who complete them. One woman director reported to the ACLU that of her 15-woman shadowing cohort, just two women translated the experience into work opportunity.⁸⁸

Experienced directors have also expressed frustration with the programs and described them to the ACLU as condescending. As one director described:

For those of us who have been in the business for a while, who have managed against tremendously difficult odds to make movies or find employment in TV, even accumulate long lists of awards along the way [. . .] These [programs] are a slap in the face and just another way to humiliate a group of people who are already being marginalized by a flawed and bias[ed] establishment. Imagine having to watch filmmaker peers with an equal or often inferior list of credits simply being handed an episode of TV to direct while you are being told to go

80. See Dinah Eng, *Meet the Woman Who Started the EEOC Investigation into Sexism in Hollywood*, FORTUNE (Oct. 19, 2015), <http://fortune.com/2015/10/19/meet-the-woman-who-started-the-eec-investigation-into-sexism-in-hollywood/> (providing data and an additional perspective on the lack of female directors).

81. *Id.*

82. *Id.*

83. Maureen Ryan, *Peak Inequality: Investigating the Lack of Diversity Among TV Directors*, VARIETY (Nov. 10, 2015), <http://variety.com/2015/tv/news/diversity-directors-tv-amc-fx-hbo-netflix-showtime-1201633122/>.

84. *Id.*

85. Letter from Melissa Goodman, Dir. of LGBT, Gender, & Reprod. Justice Project, Am. Civil Liberties Union of S. Cal., to Anna Y. Park, Reg'l Attorney, and Rosa Viramontes, Dir., EEOC (May 12, 2015), <https://www.aclusocal.org/wp-content/uploads/2015/05/EEOC-FINAL-LETTER-05-11-2015.pdf>.

86. *Id.*

87. *Id.*

88. *Id.*

back to film school first, which may or may not enhance your chances of landing the same exact job. All because you are the wrong gender.⁸⁹

The problem is especially bad because some studios have made participation in the programs an express or implied condition of getting a director position.⁹⁰ Meanwhile, men are not required to have completed a shadowing program, even those with comparable experience. For those reasons, according to the ACLU, "the sentiment that the shadowing programs are disrespectful to women and just another unnecessary and biased 'hoop' women directors have to jump through is widely held."⁹¹

Meanwhile, some directors allege that the DGA itself perpetuates discriminatory hiring practices. Namely, women directors stated that the DGA did not actively advocate enough for the hiring of women directors or, on the occasions that it did, it promoted or referred only a small handful of women members.⁹² According to the women directors, the DGA maintains a list of "experienced women and minority directors" that it provides to production companies, but a number of the women the ACLU interviewed believed that the DGA under-includes women when it provides those short-lists of recommended directors to prospective employers, therefore undercutting DGA's claim that it is attempting to get more women hired.⁹³

The current number of women working in the film industry illustrates how previous efforts at targeting sex discrimination in Hollywood did not go far enough. For those reasons, the ACLU formally requested that the EEOC, "examine the publicly available statistics and other information about hiring in the possession of the major studios, networks, and DGA to identify employers with the starkest pattern and practice of failing to hire women for directing work. The EEOC should gather further evidence of the barriers—both intentionally discriminatory and practices with a discriminatory effect on women—that women directors systemically experience."⁹⁴ Specifically, the ACLU asked that the EEOC look at "the use of 'lists' for hiring directors."⁹⁵ The ACLU also pointed to "individual stakeholders in the industry (typically white and male) look[ing] to surround themselves with other individuals with whom they feel comfortable, . . . [who] tend to think and look like the former, thereby reproducing an industry culture that routinely devalues the talent of minorities and women," which leads to a systemic underestimation of the number of women eligible for hiring.⁹⁶ Citing

89. *Id.*

90. Letter from Melissa Goodman, *supra* note 85.

91. *Id.*

92. *Id.*

93. *Id.*

94. Letter from Melissa Goodman, Dir. of LGBT, Gender, & Reprod. Justice Project, Am. Civil Liberties Union of S. Cal., to Jane Suhr, District Director, U.S. Dep't of Labor, and Janette Wipper, Regional U.S. Dep't of Labor (May 11, 2015), <https://www.aclusocal.org/wp-content/uploads/2015/05/OFCCP-FINAL-LETTER-05-11-2015.pdf>.

95. *Id.*

96. *Id.*

publicly available statistics and its own investigation, the ACLU argued that a finding by the EEOC of systemic conduct that violates Title VII is likely.⁹⁷

A. Outline of Potential Cases Against Hollywood Studios

Generally, as a preliminary issue, class action lawsuits must meet the procedural requirements of Rule 23(a)–(b) of the Federal Rules of Civil Procedure. However, Title VII of the Civil Rights Act allows the EEOC to bring a class action without meeting Rule 23's procedural requirements.⁹⁸ Because EEOC actions extinguish individual causes of action, a woman director's failure to join the EEOC class action would functionally bar that individual from later bringing a lawsuit.⁹⁹

Since the Civil Rights Act's enactment it—and specifically the disparate impact doctrine—has been hailed as a powerful tool for rooting out discrimination that has become ingrained in a business or industry.¹⁰⁰ Disparate impact claims assert that while an employer's policies may be facially neutral, they are nevertheless illegal if they have an adverse effect on a particular group. It is the plaintiff's burden to show that an employer's practice (or general decision-making processes) has an adverse impact on a particular group. The plaintiff can carry her burden by relying on statistical data. The disparate impact doctrine is a strong tool for protected groups because it does not require a showing of discriminatory intent, merely adverse effect.

The successful use of the disparate impact doctrine against a fire department with disproportionately low numbers of black firefighters illustrates how powerful the doctrine is, especially when attempting to combat biases in highly subjective or reputational capital. In *Banks v. City of Albany*, 953 F. Supp. 28 (N.D. N.Y. 1997), a black firefighter applied to the City of Albany Fire Department and was denied. Although Albany's population was nearly a quarter (21.5%) black, just 3.1% of its firefighters were black. The Department Chief, the sole hiring authority, relied on personal, subjective knowledge of the candidates. Although there was no evidence that the Chief definitely had discriminatory intent, the fact that his standards had such a discriminatory effect, and served no legitimate business necessity, was enough to grant the plaintiff's relief.

Here, the raw statistical data shows that of the 700 top films produced between 2007 and 2014, just 28 of 779 directors were women, for a total of merely 3.6%.¹⁰¹ This disparity is occurring despite the fact that women are entering film schools at the same rate as men and are achieving success in documentary and independently produced films, the two big pipelines for major studio films.¹⁰²

97. *Id.*

98. *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 467 (6th Cir. 1999).

99. *Id.* at 456.

100. Fatima G. Graves & Amy K. Matsui, *Title VII's Disparate Impact Doctrine: The Difference It's Made for Women*, ACSBLOG (May 7, 2013), <http://www.acslaw.org/acsblog/title-vii%E2%80%99s-disparate-impact-doctrine-the-difference-it%E2%80%99s-made-for-women>; see also Cara Buckley, A.C.L.U., *Citing Bias Against Women, Wants Inquiry into Hollywood's Hiring Practices*, N.Y. TIMES, May 12, 2015 at C1.

101. Stacy L. Smith et al., *Inequality in 700 Popular Films: Examining Portrayals of Gender, Race & LGBT Stats from 2007-2014*, USC ANNENBERG'S MEDIA DIVERSITY & SOC. CHANGE INITIATIVE (2014).

102. See Martha M. Lauzen, *Women in Independent Film, 2015-16*, SAN DIEGO ST. U.: CTR. FOR THE

Regardless of the intent of studio executives, their selection is adversely impacting potential women directors.

Movie studios might contend that subjective valuations are pivotal in making hiring decisions. Yet, the Supreme Court has suggested that the disparate impact doctrine can apply to an employer's subjective decision-making process. In *Watson v. Fort Worth Bank & Trust*,¹⁰³ the Court found that even though there was nothing inherently discriminatory about the use of subjective criteria, they were not immune from review. So the subjective hiring practices prevalent in Hollywood are subject to the disparate impact doctrine.

Employer defendants might also attempt to rebut the plaintiff by presenting evidence that shows their employment practice is job-related and consistent with a business necessity. For example, studios might contend that using reputational based capital, and relying on purely subjective valuation is necessary in making movies. Traditionally, that argument would rely on the notion that 1) men were more likely to be movie-consumers, 2) movies that appeal to men are action-heavy, and 3) men are better at making action films, so therefore hiring more men directors than women was a legitimate business necessity. There are two problems with that potential defense. First, it rests on the assumption that men are more likely to successfully make action films, even though, when women like Patty Jenkins have been given the chance, they too have succeeded.¹⁰⁴ Second, and perhaps even more compelling, is that men are the dominant consumers of movies. However, women are actually slightly more likely to be moviegoers than men. Moreover, they're even more likely to consume an action film if the protagonist is a woman, as in *The Hunger Games*.¹⁰⁵ Ultimately, a potential defense that the disproportionate hiring of men is necessary to make a successful film fails because it ignores the fact that women have the capacity to direct films and are just as likely as men to consume them.

B. Potential Remedies (Assuming that the EEOC Investigation Does Find Actionable Discriminatory Practices)

"Money is the only thing that will change this town."

- Paul Feig, Director¹⁰⁶

If the EEOC does find that Hollywood employs illegal hiring practices when choosing directors, then those same practices—namely, reliance on highly subjective evaluation practices and networking/relationship-based hiring and

STUDY OF WOMEN IN TELEVISION AND FILM (2016) ("By genre, women are much more likely to direct documentaries than narrative features.").

103. 487 U.S. 977 (1988).

104. Eliana Dockterman, *The New Wonder Woman Directors Means Warner Bros. is Listening*, TIME (Apr. 15, 2015), <http://time.com/3824430/wonder-woman-patty-jenkins-new-director/>.

105. Katie Rife, *Women Still Make up the Majority of Moviegoers, Prefer Female Superheroes*, A.V. CLUB (Mar. 27, 2014), <http://www.avclub.com/article/women-still-make-majority-moviegoers-prefer-female-202741>.

106. David Robb, *Panel Discussion On The Industry's Gender Problem: Hollywood May Have Reached A Tipping Point*, DEADLINE (Mar. 30, 2016), <http://deadline.com/2016/03/industry-gender-problem-panel-discussion-paul-feig-maria-bello-1201729059/>.

investment practices—might provide a basis for the EEOC to investigate the male dominance of Silicon Valley's VC firms. Under the disparate impact doctrine, the EEOC could at least look at the hiring practices of VC firms to determine if even facially neutral hiring practices might contribute to the disproportionate amount of power and control held by men. The EEOC would more likely have to investigate VC firms' hiring practices for associates and partners because they are employees and therefore under the scope of Title VII, unlike entrepreneurs, who do not enter into employment relationships with the VC firms. Unlike Ellen Pao's famous lawsuit against VC giant Kleiner-Perkins,¹⁰⁷ a potential EEOC investigation into all of Silicon Valley's VC firms could focus instead on the tactics that pervade the industry, and not be limited to the disputed facts of Pao's situation.

Assuming that the EEOC were to find actionable discrimination in Hollywood and Silicon Valley, what could the law do? The lack of gender diversity within both Hollywood and Silicon Valley is well documented and increasingly a subject of public discourse. And yet, the law has been slow to respond. That slow response might be because solutions to both are hard to define. And many potential solutions—like increasing the number of women in coding programs, or forming mentoring relationships with women in both fields—lie beyond the scope of legal power.

Additionally challenging are the free speech protections for movie studios and producers. Protected in the First Amendment are “both the right to speak freely and the right to refrain from speaking at all.”¹⁰⁸ In other words, the state cannot force certain kinds of speech, and society shouldn't want it to hold that power, even if it would be a convenient way to increase the number of women directors. Movies are a form of speech,¹⁰⁹ and choosing the director is an artistic decision. In that sense, it would be constitutionally questionable for a court to dictate that producers and studios choose women directors. If the federal government (via judicial order) demanded that studios employ a specific number of women directors or use certain percentages of their budgets to women-directed projects, it would be inserting itself into the creative decision making process, and therefore unconstitutionally compelling producers and studios to speak. Simultaneously, forcing movie studios' limited resources to be allocated to women-led projects would restrict those studios' speech via men-led projects. Beyond constitutional concerns, the use of quotas might feed into the feeling that many directors already expressed to the ACLU, that certain women were merely being used as tokens and that there would be no guarantee that additional consideration would be given to women directors.

A tax credit, however, might provide a legislative option that would avoid free speech concerns. While the state cannot restrict or compel speech, the government may employ more norm-creating discretion when subsidizing

107. David Streitfeld, *Lawsuit Shakes Foundation of a Man's World of Tech*, N.Y. TIMES, June 2, 2012, at BU1.

108. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

109. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (holding that motion pictures, like the traditional press, are an important medium for the “communication of ideas” and therefore protected by the First Amendment).

speech. In fact, the federal government already makes decisions with regard to subsidizing speech through its favorable treatment of nonprofit organizations. In *Bob Jones University v. United States*, a religiously affiliated university would have been eligible for favorable tax treatment as a nonprofit organization, but the IRS deemed it ineligible for violating public policy because of the university's express policies against students of color.¹¹⁰ There, the Court reasoned that while religious organizations have a right to be free from government intrusion, they have no right to government subsidies such as favorable tax treatment.¹¹¹

Applying the reasoning from *Bob Jones*, it would not be unconstitutional for the federal government to offer favorable tax treatment to studios or production companies that employ women directors. The federal government could allow a tax credit for those that employ women directors, or it could allow a deduction for parts of production budgets that were allocated to women-directed projects. The State of New York is already considering such an option.¹¹² There, the Writers Guild of America, East (WGAE) has been lobbying to bring more writer's rooms to New York. Already, New York offers an Empire State Film Production Credit. Included in the bill is a new approach—a credit for hiring women or minority writers. Namely, writers' salaries and fees within production costs would be eligible for the existing credit.¹¹³ As Lowell Peterson, executive director of the WGAE explained, "the tax credit has been extraordinarily successful in attracting jobs to New York; producers most definitely calculate various aspects of their budgets with the tax credit in mind and make decisions accordingly. We anticipate the same thing would be true with this diversity tax credit."¹¹⁴ Currently the New York legislature has stalled on the bill, though it is expected to come up again. A similarly-designed tax credit or deduction for those that employ women directors would provide a financial incentive to get the industry hiring new, women directors.

As one Hollywood director explained, "money is the only thing that will change this town."¹¹⁵ Money as the industry's main motivating source is a widely-held sentiment around Hollywood, and one equally applicable to Silicon Valley. In that sense, the arguments for using the constitutional tool of favorable tax treatment is a compelling one. And yet, the idea of state involvement in speech, even indirectly through favorable tax treatment, feels Soviet-like. Do we want the federal government involved in making movies—especially given the hugely important role they play in defining American culture?

Given the concerns about state-influenced movie creation, although favorable tax treatment might be constitutionally viable, it seems unlikely to garner the sort of political capital necessary to pass any legislation that would grant it such favorable treatment. Instead, the EEOC might seek court orders to force movie studios and producers to implement training programs aimed at addressing

110. *Bob Jones Univ. v. United States*, 461 U.S. 574, 581 (1983).

111. *See generally id.*

112. *See* S. 5370A, 2014-2015 Leg., Reg. Sess. (N.Y. 2015).

113. *See id.*

114. Marin Gazzaniga, *3 Solutions to Hollywood's Woman Problem*, FORTUNE (Aug. 6, 2015), <http://fortune.com/2015/08/06/fixing-hollywood-woman-problem/>.

115. Robb, *supra* note 106.

implicit biases. In fact, some major players in the tech industry, including Google and Facebook, are already voluntarily implementing such programs in the hopes of diversifying their companies.¹¹⁶ Pinterest, for example, is including workshops on unconscious bias as part of their plan to increase diversity among their workforce.¹¹⁷ Court-ordered implementation of bias training programs would not interrupt the manner in which Hollywood operates—highly subjective valuation and hiring process would remain legal—but it would help eliminate implicit biases from those decision making processes. This approach would avoid First Amendment concerns and also prevent government regulators from directly changing an industry by disallowing some of the practices integral to its functioning. Rather, it provides a way for those practices to remain legal by helping ensure that those practices are not polluted by implicit biases.

The companies that have introduced new plans for increasing diversity among their workforce have done so largely in response to employees or other insiders releasing unflattering data about their employment statistics. Pinterest's plan to increase diversity didn't develop until engineer Tracy Chou began collecting the numbers about women in tech in 2013.¹¹⁸ Similarly, Google and Facebook began developing more inclusive policies and hiring practices only once unflattering data about their employee composition became public.¹¹⁹ And in Hollywood, the entire topic of gender diversity first garnered national attention after the Sony leak revealed how much less Jennifer Lawrence was paid than some of her lesser-known co-stars in *American Hustle*.¹²⁰

Recognizing that these information leaks have led companies to begin self-imposing plans to increase diversity, the EEOC should begin monitoring movie studios and tracking their employment data. Studios could be required to regularly release the number of women-led projects they fund, and what percentage of their budgets were allocated to those projects. The EEOC could store that information on an openly accessible website where moviegoers and aspiring women directors could go to when deciding which movies to watch or which studios to seek out when searching for a job. The regular release of information in a centralized location, like an EEOC-maintained web site, might keep the spotlight on Hollywood as it attempts to become more gender balanced.

The effect of continued EEOC-led scrutiny of Hollywood might be forecast by the legally unsuccessful battle of Ellen Pao in Silicon Valley. Even though a jury ultimately ruled against her, the press coverage of Pao's case triggered a rise of workplace discrimination suits filed against VC firms and other companies in

116. Rachel Gillet, *Here's How Google, Facebook, and Hollywood are trying to fix 'hidden' bias against half the population*, BUS. INSIDER (Dec. 6, 2015), <http://www.businessinsider.com/how-the-tech-industry-and-hollywood-hope-to-combat-sexism-2015-12>.

117. Julia Greenberg, *Pinterest's Bold Plan to Fix its Diversity Problem*, WIRED (July 30, 2015), <https://www.wired.com/2015/07/pinterest-new-plans-improve-diversity/>.

118. *Id.*

119. *See id.* (suggesting that these companies revealed their diversity numbers and then began developing policies to combat the unflattering publicity).

120. Jennifer Lawrence, *Why Do I Make Less than My Male Co-Stars?*, LENNY (Oct. 14, 2015), <http://www.lennyletter.com/work/a147/jennifer-lawrence-why-do-i-make-less-than-my-male-costars/>.

Silicon Valley, dubbed "The Pao Effect" by lawyers in the Bay Area.¹²¹ In that sense, Pao's failed lawsuit might represent the most important and purely non-legal aspect of the EEOC's investigation into Hollywood. Namely, the investigation itself, coupled with the lack of diversity at the Oscars, has brought a critical spotlight on the film industry. Whether or not the studios will be legally forced to respond might ultimately depend on the classification of directors as employees or independent contractors. But from an economic standpoint, Hollywood is now forced to confront its gender disparity problem or risk losing public support from moviegoers. As tech companies in Silicon Valley and beyond, like Netflix and Amazon, increase their original content production, thereby providing substitute goods for Hollywood productions, Hollywood must address its lack of gender diversity. Otherwise, entertainment consumers might increasingly satisfy their entertainment needs in ways other than by the traditional movie-going experience. Similarly, an industry-wide investigation by the EEOC into Silicon Valley's VC firms might force the firms to more aggressively recruit women employees or face a backlash from entrepreneurs choosing to sell their equity to VC firms headquartered in New York, Boston, Austin, Raleigh-Durham, or a number of the nation's other entrepreneurial hotbeds.

CONCLUSION

Ultimately, the law cannot provide the only solution to the stark gender disparity in both Hollywood and Silicon Valley. Certainly more women need to be encouraged to enter tech fields, the industries must be encouraged to increase mentoring programs for women, and state governments should consider granting funding to women directors and women entrepreneurs. Nonetheless, the publicity stemming from EEOC investigations can serve as an effective mechanism for coercing both Hollywood and Silicon Valley to critically examine current hiring and evaluation practices.

The need to ensure equal opportunity in both Hollywood and Silicon Valley is particularly important now. Already, the entertainment industry plays a central role in shaping American culture.¹²² As the digitalization of media continues to proliferate, courtesy of new technologies emerging from Silicon Valley, Hollywood's content will become even more powerful in influencing how Americans think and communicate. Therefore, it is increasingly important that women are in positions to contribute to the stories that are made and the devices on which those stories are told.

121. Vivian Giang, *Silicon Valley Attorneys: Already Seeing a 'Pao Effect,'* FORTUNE (Apr. 8, 2015), <http://fortune.com/2015/04/08/silicon-valley-pao-effect/>.

122. MISS REPRESENTATION (Girls Club Entertainment 2011).